

STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT - LOS ANGELES

|                                   |   |                                 |
|-----------------------------------|---|---------------------------------|
| In the Matter of                  | ) | Case No.: <b>12-O-17972-RAH</b> |
|                                   | ) |                                 |
| <b>MARLENE GERDTS,</b>            | ) | <b>DECISION</b>                 |
|                                   | ) |                                 |
| <b>Member No. 93815,</b>          | ) |                                 |
|                                   | ) |                                 |
| <u>A Member of the State Bar.</u> | ) |                                 |

**Introduction**<sup>1</sup>

Respondent Marlene Gerdts failed to timely file proof of payment of nine required monthly restitution payments. Although a few of these payments were made in a timely fashion, and all of them were eventually paid, no required proof of payment was timely provided to the Office of Probation of the State Bar of California (Office of Probation) on any of these payments. While the amount of money involved is not substantial, respondent's failure to comply with the terms of probation (or seek relief from those conditions) reflects a lack of understanding of the seriousness of her obligations. Her prior record of serious misconduct could warrant disbarment, but the facts and circumstances surrounding the present misconduct—in particular her medical and emotional problems occurring at the time of the misconduct—indicates that a lesser sanction is warranted. As such, the court recommends that respondent be actually suspended for a minimum period of three years and until: (1) she makes full restitution;

---

<sup>1</sup> Unless otherwise indicated, all references to rules refer to the State Bar Rules of Professional Conduct. Furthermore, all statutory references are to the Business and Professions Code, unless otherwise indicated.

and (2) provides proof to the State Bar Court of her rehabilitation, fitness to practice, and learning and ability in the general law.

### **Significant Procedural History**

The Office of the Chief Trial Counsel of the State Bar of California (State Bar) initiated this proceeding by filing a Notice of Disciplinary Charges (NDC) on April 19, 2013. On May 23, 2013, respondent filed her response. Trial commenced on April 2, 2014. On that same day, the parties filed a First Amended Stipulation as to Facts and Admission of Documents. Deputy Trial Counsel William Todd represented the State Bar. Michael H. Artan, Esq., represented respondent. The matter was submitted for decision on June 30, 2014.

### **Findings of Fact and Conclusions of Law**

Respondent was admitted to the practice of law in California on December 16, 1980, and has been a member of the State Bar of California at all times since that date.

#### **Facts**

On April 20, 2010, the State Bar Court issued a Decision in the matter entitled *In the Matter of Marlene Gerdts*, case nos. 04-N-10859, et al. On August 25, 2010, the California Supreme Court issued Order No. S183851 (Disciplinary Order) imposing on respondent the discipline recommended by the State Bar Court in its April 20, 2010 Decision. In the Disciplinary Order, the California Supreme Court ordered that respondent be suspended from the practice of law for three years, that execution of the suspension be stayed, and that respondent be placed on probation for four years subject to certain conditions including a two-year actual suspension. On or about August 25, 2010, the Clerk of the Supreme Court of the State of California properly served a copy of the Disciplinary Order by mail on respondent. Respondent received the Disciplinary Order.

On or about September 10, 2010, a probation deputy of the Office of Probation mailed a letter to respondent at her official membership records address, reminding respondent of the conditions of her probation. Respondent received the letter from the probation deputy. One of the conditions of the Disciplinary Order required that respondent make a restitution payment of \$20 per month to Carmen Morales, and provide proof of each payment to the Office of Probation. The Disciplinary Order became effective on September 24, 2010.

### **Probation Violations**

Respondent began making regular monthly payments to Carmen Morales (Morales) in or about October 2010. Proof of payment was provided in the form of a declaration signed by Morales.<sup>2</sup> However, Probation Deputy Ivy Cheung testified that the declarations sometimes contained incorrect information, were undated, or were provided to Morales with an unstamped envelope, requiring Morales to pay for the postage.<sup>3</sup> As a result of these problems, on around December 6, 2011, Deputy Cheung instructed respondent not to use declarations as proof of payment, but rather to provide a copy of the front and back of the canceled check as such proof.

This change was a response by the Office of Probation to the problems it faced in handling the incomplete or incorrect declarations. Thereafter, respondent's compliance with the proof of payment condition was spotty, at best. Her record of noncompliance with this condition since November 2010 is as follows:

---

<sup>2</sup> Respondent prepared the declaration in both English and Spanish, since Morales was a Spanish speaker.

<sup>3</sup> Deputy Cheung testified that she had only been employed at the Office of Probation for the last two and a one-half years, so she was not personally aware of all of these problems. She based her testimony on the contents of the file maintained by the Office of Probation.

| <b>Payment Due Date</b>  | <b>Payment Made?</b> | <b>Payment Timely?</b> | <b>Proof Timely?</b> |
|--|----------------------|------------------------|----------------------|
| November 2010  | Yes                  | Yes                    | No                   |
| December 2010  | Yes                  | Yes                    | No                   |
| January 2011   | Yes*                 | No                     | No                   |
| February 2012  | Yes*                 | No                     | No                   |
| March 2012   | Yes*                 | No                     | No                   |
| May 2012   | Yes*                 | No                     | No                   |
| June 2012  | Yes*                 | No                     | No                   |
| August 2012  | Yes*                 | No                     | No                   |
| September 2012   | Yes*                 | No                     | No                   |
| *Payment for the indicated months was made by a lump sum payment on December 23, 2012. |                      |                        |                      |

The above chart reflects only the payments for which the Office of Probation contends there were problems. As such, the balance of her payments were apparently properly processed. Respondent has provided proof of payment for all of the above payments, albeit late. As a result of the above payment and proof of payment history, respondent violated her probation conditions requiring her to timely provide proof of payment for each monthly payment.

Respondent credibly testified at trial that Morales held some of these checks, and failed to negotiate them in a timely manner. While this assertion could have justified a motion seeking modification of the terms of probation, no such motion was filed. Respondent also credibly testified that Morales changed addresses without advising her. The un rebutted testimony was that Morales moved to Missouri, returned to Los Angeles, returned to Missouri at a different address, then moved back to Los Angeles. Respondent attempted to obtain Morales's correct address from the Office of Probation, but was unsuccessful.

Clearly, it was respondent's duty to use reasonable efforts to locate Morales and, if unsuccessful, advise the court of her efforts and seek a modification of her obligations. She did not offer proof that she made such efforts, other than contacting the Office of Probation. She also did not file such a request for modification, despite having been earlier notified to do so in a

letter dated September 10, 2010, from the Office of Probation. Respondent credibly testified that she began using cashier's checks because her personal checks were not being cashed. However, she found it very difficult and time consuming to obtain copies of the canceled cashier's checks from the bank.

Finally, it should be noted that respondent had relative success in obtaining proper proof of payment using the declaration method of proof of payment during much of 2011. That changed in December 2011, when Deputy Cheung changed the method of proof to providing the front and back of the canceled checks. In February 2012, the problems began and continued throughout 2012, indicating that the new method of proof was not working.

### **Conclusions**

#### ***Count One – § 6068, subd. (k) [Failure to Comply with Probation Conditions]***

Section 6068, subdivision (k), provides that an attorney has a duty to comply with all conditions attached to any disciplinary probation. Respondent failed to comply with her probation obligations in willful violation of section 6068, subdivision (k), by failing to timely pay her monthly restitution and submit proof of such payment to the Office of Probation, as set forth above.

### **Aggravation<sup>4</sup>**

#### **Prior Record of Discipline (Std. 1.2(b)(i).)**

Respondent has two prior records of discipline, both of which are very serious and represent significant aggravation. In the first, the Review Department found respondent culpable of failing to promptly refund unearned fees, failing to perform and communicate, commingling funds in her client trust account, issuing NSF checks, and committing multiple counts of moral

---

<sup>4</sup> All references to standards (Std.) are to the Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct.

turpitude stemming from concealment and dishonesty. Among other aggravation, the court found a pattern of misconduct and significant harm. Respondent was actually suspended for two years even though she was given strong mitigation credit for her 15 years of discipline-free practice. The court also awarded some mitigation for respondent's emotional problems, including the burden of contending with the dissolution of her marriage and her daughter's medical problems. This discipline became effective on January 22, 2004. (S.B.C. case nos. 99-O-12396, et al.; (S118399).)

In her second discipline, respondent stipulated to failing to perform and communicate, failing to refund \$22,000 in unearned fees, committing multiple acts of moral turpitude relating to dishonesty and concealment, and violating rule 955 of the California Rules of Court (now rule 9.20). Respondent agreed that she had caused significant harm to her client. In mitigation, respondent cooperated with the State Bar, demonstrated remorse, and was suffering from financial and family problems. Respondent also received mitigation for her illnesses and/or physical problems. The Supreme Court ordered, among other things, that respondent be actually suspended for two years. This discipline became effective on September 24, 2010. (S.B.C. case nos. 04-N-10859, et al.; (S183851).)

**Multiple Acts/Pattern of Misconduct (Std. 1.5(b).)**

Respondent failed to timely provide proof of payment on nine occasions. This constitutes multiple acts of misconduct. (*In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697, 702 [failure to file fifth and sixth probation reports and proof of continuing education considered multiple acts of wrongdoing].)

///

## **Mitigation**

### **Extreme Physical/Emotional Difficulties (Std. 1.6(d).)**

Respondent suffers from serious health problems. She has had two open heart surgeries in 2007 and 2009. In these surgeries, the doctors tried angioplasty unsuccessfully, and eventually inserted stents. Further, the angioplasty damaged the wall of the artery, so additional stents had to be inserted in a separate procedure. She has had a total of eight stents inserted. She continues to suffer from pain as a result of these surgeries. For this condition, she has been admitted to the hospital about 50 times.

Respondent also has had other medical problems, which continue to today, including a malignant carcinoid tumor of the small intestine causing intestinal blockage. She had a hernia which resulted from this problem, which still continues to result in pain. She also has had kidney stones removed surgically, two cataracts removed, high blood pressure, and diverticulosis.

Respondent credibly testified that these medical problems affected her ability to function. Further, they were a serious distraction from her performing the duties required in her probation, since respondent has been admitted to the hospital numerous times for these problems. While respondent did not present medical testimony, she presented extensive medical documentation supporting her testimony as to her condition.

In addition to her physical problems, respondent has also had family medical issues that distracted her from complying with probation. Her sister suffered from heart problems, a stroke resulting in paralysis, and shingles during 2011 and 2012. Her brother has had three heart surgeries during this same period of time. Finally, her daughter had seizures in 2012, and is under the care of a neurologist and a psychiatrist.

While respondent's poor physical health and emotional condition during the period of the misconduct are factors in mitigation, it has not been established by clear and convincing

evidence that these problems no longer pose a risk that respondent will commit misconduct. Nevertheless, the court assigns some weight to this mitigation.

**Good Faith (Std. 1.6(b).)**

Respondent made serious attempts to comply with the terms of her probation. Where she failed, however, was that she never sought relief from the court for her inability to comply due either to her serious medical problems, the payee's failure to timely deposit the checks, or her inability to timely obtain copies of the front and back of the checks as proof. As noted above, her performance in providing such proof was substantially better during 2011, when the Office of Probation allowed her to use the declaration method of proving her payments. When the Office of Probation changed the procedures, she began to have more serious compliance problems. As such, the court credits her with some consideration in mitigation for her good faith attempts to comply.

**Good Character (Std. 1.6(f).)**

Respondent presented several character witnesses, all of whom were aware of the extent of her misconduct. These witnesses included two attorneys and others who were intimately familiar with her work as an attorney and also knew her personally. They uniformly praised her high ethical standards and her honesty. This testimony represents a significant mitigating factor.

**Cooperation with the State Bar (Std. 1.6(e).)**

Respondent entered into a partial stipulation as to facts and the admission of documents at trial. The stipulated facts, however, were fairly narrow and not difficult to prove. Accordingly, respondent's cooperation warrants limited consideration in mitigation.

**Discussion**

The purpose of State Bar disciplinary proceedings is not to punish the attorney, but to protect the public, to preserve public confidence in the profession, and to maintain the highest



possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d. 103, 111; *Cooper v. State Bar* (1987) 43 Cal.3d. 1016, 1025.)

In determining the level of discipline, the court looks first to the standards for guidance. (*Drociak v. State Bar* (1991) 52 Cal.3d. 1085, 1090; *In the Matter of Koehler* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 615, 628). Second, the court looks to decisional law. (*Snyder v. State Bar* (1990) 49 Cal.3d. 1302, 1310-1311; *In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

Standard 1.1 provides that the primary purposes of disciplinary proceedings are the protection of the public, the courts, and the legal profession; the maintenance of high professional standards; and the preservation of public confidence in the legal profession. This standard also provides that rehabilitation can “be an objective in determining the appropriate sanction in a particular case, so long as it is consistent with the primary purposes of discipline.”

Standard 1.7 provides that if aggravating or mitigating circumstances are found, they should be considered alone and in balance with any other aggravating or mitigating factors.

In this case, the standards provide for the imposition of a minimum sanction of actual suspension. (Standard 2.8(a).) Standard 2.8(a) provides that disbarment or actual suspension is appropriate for disobedience or violation of a court order related to the member’s practice of law, the attorney’s oath, or the duties required of an attorney.

Due to respondent’s prior record of discipline, the court also looks to standard 1.8 for guidance. Standard 1.8(a) provides that if an attorney has a single prior record of discipline, the sanction must be greater than the previously imposed sanction unless the prior discipline was so remote in time and the previous misconduct was not serious enough that imposing greater discipline would be manifestly unjust. Standard 1.8(b) states that when an attorney has two prior records of discipline, disbarment is appropriate in the following circumstances, unless the most

compelling mitigation circumstances clearly predominate or the misconduct underlying the prior discipline occurred during the same time period as the current suspension: (1) actual suspension was ordered in any one of the prior disciplinary matters; (2) the prior disciplinary matters coupled with the current record of discipline demonstrate a pattern of misconduct; or (3) the prior disciplinary matters coupled with the current record of discipline demonstrate the member's unwillingness or inability to conform to ethical responsibilities.

The standards, however, “do not mandate a specific discipline.” (*In the Matter of Van Sickel* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, 994.) It has long been held that the court is “not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, [the Supreme Court is] permitted to temper the letter of the law with considerations peculiar to the offense and the offender.” (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222.) Yet, while the standards are not binding, they are entitled to great weight. (*In re Silverton* (2005) 36 Cal.4th 81, 92.)

The State Bar urges that respondent be disbarred. Respondent argued that, in the event culpability was found, respondent should receive limited probation.

Historically, the California Supreme Court and the Review Department of the State Bar Court have not followed standard 1.8(b) in a rigid fashion.<sup>5</sup> (See *Conroy v. State Bar* (1991) 53 Cal.3d 495; *In the Matter of Meyer* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 697; *In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 131; *In the Matter of Trousil* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 229.) It has generally been held that standard 1.8(b) is to be applied with due regard to the nature and extent of the attorney's prior record. (*In the Matter of Anderson* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 208, 217.)

---

<sup>5</sup> Standard 1.8(b) was previously identified as standard 1.7(b).

Considering the nature and extent of respondent's prior record and the fact that the present misconduct occurred during a period of time when respondent was experiencing serious health problems, the court finds a recommendation of disbarment to be excessive and unnecessary.

A disciplinary recommendation must be consistent with the discipline in similar proceedings. (See *Snyder v. State Bar* (1990) 49 Cal.3d 1302, 1310-1311.) In *In the Matter of Broderick* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 138, the attorney's misconduct in the probationary proceeding and concurrent original disciplinary proceedings<sup>6</sup> was significantly related to his prior misconduct, in that both involved disobedience of court orders. The attorney violated the restitution and reporting requirements of his probation. In aggravation, he had one prior record of discipline, was culpable of multiple acts of wrongdoing, and committed an uncharged violation of the therapy requirement of his probation. In mitigation, the attorney made good faith attempts to pay some restitution and obtain therapy, and was candid and cooperative with the State Bar. The Review Department recommended, among other things, that the attorney be suspended for a period of one year.

Similar to *Broderick*, respondent did not satisfy the restitution requirements of her probation. Like the attorney in *Broderick*, respondent made some efforts to attempt to comply with her restitution conditions, but ultimately failed to seek a modification of her probation obligations. The present matter involves more aggravation than *Broderick*, in that respondent has two serious prior records of discipline and should be aware of her need for strict compliance with her probation obligations.

---

<sup>6</sup> The original disciplinary proceeding involved the attorney's misuse of his client trust account, his loss of a settlement check, and his grossly negligent failure to reply to reasonable client status inquires and two letters from a State Bar investigator.

While the court is concerned by the serious nature of respondent's two prior disciplines, the present matter, by comparison, is considerably less egregious. In fact, had respondent been proactive in seeking a timely motion to modify the terms of her probation due to the problems she was experiencing complying with her restitution conditions, this proceeding possibly could have been avoided. That said, respondent's failure to comply with the terms of her disciplinary probation reflects a fundamental lack of understanding of the seriousness of her obligations. Although the court is sympathetic to her health and family problems, it has not been established by clear and convincing evidence that these problems no longer pose a risk that respondent will commit misconduct. In fact, respondent's emotional and physical wellbeing were highlighted in both of her prior discipline matters, yet respondent's misconduct continued to the present matter, albeit on a considerably smaller scale.

Accordingly, the court finds that a three-year minimum period of actual suspension and/until respondent provides proof to the State Bar Court of full restitution to Carmen Morales and her rehabilitation, fitness to practice, and learning and ability in the general law is adequate to achieve the primary purposes of attorney discipline, most notably public protection.

### **Recommendations**

It is recommended that respondent Marlene Gerds, State Bar Number 93815, be suspended from the practice of law in California for four years, that execution of that period of suspension be stayed, and that respondent be placed on probation<sup>7</sup> for a period of five years subject to the following conditions:

1. Respondent is suspended from the practice of law for a minimum of the first three years of probation, and respondent will remain suspended until the following requirements are satisfied:

---

<sup>7</sup> The probation period will commence on the effective date of the Supreme Court order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.)

- i. Respondent must make restitution to Carmen Morales in the amount of \$22,000 plus 10 percent interest per year from January 21, 2004 (or reimburse the Client Security Fund, to the extent of any payment from the fund to Carmen Morales, in accordance with Business and Professions Code section 6140.5) and furnish proof to the State Bar's Office of Probation in Los Angeles;<sup>8</sup> and
  - ii. Respondent must provide satisfactory proof to the State Bar Court of her rehabilitation, fitness to practice and present learning and ability in the general law before her actual suspension will be terminated. (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(c)(1).)
2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct, and all of the conditions of respondent's probation.
3. Within 10 days of any change in the information required to be maintained on the membership records of the State Bar pursuant to Business and Professions Code section 6002.1, subdivision (a), including respondent's current office address and telephone number, or if no office is maintained, the address to be used for State Bar purposes, respondent must report such change in writing to the Membership Records Office and the State Bar's Office of Probation.
4. During the probation period, respondent must report in writing quarterly to the Office of Probation. The reports must be postmarked no later than each January 10, April 10, July 10, and October 10 of the probation period. Under penalty of perjury, respondent must state in each report whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all of respondent's probation conditions during the preceding calendar quarter or applicable reporting period. If the first report would cover less than 30 days, no report is required at that time; however, the following report must cover the period of time from the commencement of probation to the end of that next quarter. In addition to all quarterly reports, a final report must be postmarked no earlier than 10 days before the last day of the probation period and no later than the last day of the probation period.
5. Subject to the assertion of applicable privileges, respondent must answer fully, promptly, and truthfully, any inquiries of the Office of Probation or any probation monitor that are directed to respondent personally or in writing, relating to whether respondent is complying or has complied with respondent's probation conditions.
6. Within one year after the effective date of the discipline herein, respondent must submit to the Office of Probation satisfactory evidence of completion of the State Bar's Ethics School and passage of the test given at the end of that session. This requirement is separate from any Minimum Continuing Legal Education (MCLE) requirement, and respondent will not receive MCLE credit for attending Ethics School. (Rules Proc. of State Bar, rule 3201.)

---

<sup>8</sup> Respondent will be credited any principle or interest payments she has made in connection with her probation in State Bar Court case nos. 04-N-10859, et seq. (S183851).

7. Within 30 days after the effective date of discipline, respondent must contact the Office of Probation and schedule a meeting with respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the period of probation, respondent must promptly meet with the probation deputy as directed and upon request.

At the expiration of the probation period, if respondent has complied with all conditions of probation, respondent will be relieved of the stayed suspension.

### **Multistate Professional Responsibility Examination**

It is recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination during the period of her suspension and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period.

### **California Rules of Court, Rule 9.20**

It is further recommended that respondent be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 days, respectively, after the effective date of the Supreme Court order in this proceeding. Failure to do so may result in disbarment or suspension.

### **Costs**

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

Dated: October \_\_\_\_, 2014

---

RICHARD A. HONN  
Judge of the State Bar Court